UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(MIAMI DIVISION)

HONORABLE MAYOR RAUL L. MARTINEZ, ET AL.,

Plaintiffs,

JOHN ELLIS "JEB" BUSH, Governor, State of Florida; ET AL.,

Defendants,
_____/

PETER R. DEUTSCH, ET AL.,

Plaintiff-Intervenor.
_____/

CASE NO. 02-20244-JORDAN

Case No. : 02-10028 CIV-JORDAN

GEORGE MAURER,

Plaintiff,

v.

STATE OF FLORIDA; ET AL.,

Defendants.
_____/

SPEAKER TOM FEENEY'S MOTION FOR EMERGENCY RELIEF AND INCORPORATED MEMORANDUM OF LAW

MOTION FOR EMERGENCY RELIEF

Tom Feeney, Speaker of the Florida House of Representatives ("Speaker Feeney"), moves this Court for entry of an order that (1) declares that, in light of the Department of Justice's denial of preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c (the "Voting Rights Act"), no effective plan of apportionment for the Florida House of Representatives exists, and (2) adopts, in accordance with federal precedent, an interim plan of apportionment for the Florida

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House of Representatives that adheres to the core of the plan now before the Court, while remedying objections under Section 5 of the Voting Rights Act articulated by the Department of Justice. *See Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982), stay denied, 456 U.S. 102 (1982); *Burton v. Hobbie*, 543 F. Supp. 235 (1982); *Arizonans for Fair Representation v. Symington*, 1993 WL 375329 (D. Ariz. June 19, 1992). As grounds therefor the Speaker states:

1. On March 22, 2002, the Florida House passed House Joint Resolution 1987 ("HJR 1987") establishing the lines for Florida's 120 House Districts and 40 Senate Districts (the "House Plan," and the "Senate Plan," respectively). Both the House Plan and Senate Plan have been subject to legal challenges in this litigation.

2. Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, requires that any covered jurisdiction that enacts or seeks to administer any change in "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" shall either institute (1) an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or language minority status or (2) submit the proposed changes to the United States Attorney General for preclearance.

3. In Florida, Collier, Hardee, Hendry, Hillsborough, and Monroe Counties are areas to which the requirements of Section 5 apply. Thus, any statewide legislative apportionment plan touches upon these five counties and requires preclearance under Section 5 of the Voting Rights Act.

4. By letter dated April 30, 2002, in accordance with Section 5 of the Voting Rights Act, Speaker Feeney and Florida Senate President John McKay ("President McKay") submitted

the House Plan and Senate Plan to the United States Department of Justice (the "DOJ") for pre-clearance.

5. On July 1, 2002, the DOJ objected to Florida's House Plan on the grounds that District 101 of the plan was not in compliance with Section 5 of the Voting Rights Act. The DOJ, however, did preclear the plan for the Florida Senate. A copy of the July 1, 2002 letter is attached hereto as Exhibit A.

6. The DOJ's denial of preclearance renders the House Plan unenforceable as a matter of law. The 2000 Census for the State of Florida shows that population changes have rendered the 1992 plan, which is the last precleared plan, malapportioned.

7. As a result of the DOJ's denial of preclearance under Section 5 of the Voting Rights Act, and the malapportionment of the 1992 plan, the voters of the State of Florida are left with no constitutionally-effective plan of apportionment to elect members of the Florida House of Representatives.

8. Because the House Plan has been rendered ineffective, it is no longer appropriate for the Court to consider Plaintiff's claims regarding its legality.

9. Time is of the essence in obtaining final redistricting plans. The deadline for candidate qualifying is noon on July 22, 2002. Two deadlines have already passed during the pendancy of this litigation. The qualifying deadline for alternates and write-in candidates for state offices was July 1, 2002 and Florida's Secretary of State estimated that June 14, 2002 was the date by which a final plan needed to be available to the Florida Department of State and the sixty-seven county supervisors of elections so that primary and general election deadlines could be met. *See* Defendant Katherine Harris's Response to Plaintiff's Motion to Remand, filed in

Brown v. State of Florida, et al. Case No. 02-60459-CIV-JORDAN ("Brown II") [D.E. 13] at ¶ 3.

10. It is now well past that June 14th cut-off date, and Florida is without any plan to implement. This timeframe, combined with the absolute lack of any effective plan of apportionment for the Florida House of Representatives, has created exigent circumstances.

11. Furthermore, if the Legislature were to be called back into session to address the issue identified by the DOJ, it might be required to present the plan to the Florida Supreme Court for review, as well as resubmission to the DOJ for a second Section 5 review. That process, together with the other requirements of Florida law, would have the effect of pushing the elections set for September and November well past the times that voters expect them to be held, creating voter confusion across the state.

12. Unless this Court orders the use of a plan of apportionment for the Florida House of Representatives, Florida's electoral processes and government will be severely disrupted, and the State of Florida will be left with no constitutionally effective plan of apportionment for that government body.

13. Speaker Feeney attaches hereto a plan for reapportioning the Florida House that addresses the concerns expressed by the DOJ. The plan modifies the districts in and around District 101 and two adjoining districts to cure the objection posed by the DOJ. A compact disc containing a FREDS file of the new plan is attached as Exhibit B, while a text explanation of the plan is attached hereto as Exhibit C.

14. In 1992, the Legislature created House District 102 that stretched from northwest Miami-Dade County to Collier County. The District included the city of Hialeah, which was one of the fastest growing areas in Florida during the past decade and is also one of the areas with the

highest concentration of Hispanic population. As would be anticipated, the 2000 Census showed House District 102 to be one of the most overly populated House Districts in Florida. Accordingly, House District 102 needed to lose significant population in the 2002 Redistricting process.

15. Because of the population shifts experienced with the 2000 Census, the Legislature created House District 101 (stretching from southwest Broward County to Collier County) with a similar configuration to the current House District 102. Southwest Broward County is similar in anticipated population growth to northwest Miami-Dade County ten years ago. Although there is a Hispanic population in southwest Broward County, it is not nearly as concentrated as that in northwest Miami-Dade County; accordingly, House District 101 has less Hispanic population than the current House District 102.

16. The proposed interim House Plan expands adjoining House District 112 into Collier County and thereby creates a majority Hispanic House District in Collier County, similar to that of current House District 102. The only House Districts in the proposed interim House Plan that differ from those in the enacted House Plan are House Districts 101, 112 and 76.[1]

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[1] A general summary of the changes to the three Districts are as follows:

District 101 in the proposed interim House Plan gains additional Broward County population from District 112 in the enacted House Plan, particularly portions of Pembroke Pines and Miramar. District 101 will no longer cover the southern portions of Collier County. It will mostly be bounded on the south and west by I-75. The new northwest boundary of District 101 is extended further west to I-75, and the southwest boundary is extended further west.

District 112 in the proposed interim House Plan becomes a tri-county district by adding portions of Collier County. The District enters Collier County from the east, generally not extending further north than I-75, commonly referred to as Alligator Alley. East of State Road 29, the southern boundary of the district is the Monroe County line. Further west, the southern boundary is generally US 41, the Tamiami Trail. The western boundary of the district is generally County Road 951. In Collier County, District 112 will take in Naples Manor and part of the Golden Gate.

District 76 in the proposed interim House Plan gains additional coastal territory, stretching south from Naples to now include Marco Island, Everglades City and Chokoloskee. Generally, the Gulf of Mexico bounds this District on the west and US Highway 41, commonly known as the Tamiami Trail, bounds this District on the east.

WHEREFORE, Speaker Feeney respectfully requests that this Court grant the following relief:

A. Enter an Order setting this matter for an emergency hearing on Monday, July 8, 2002;

B. Enter an Order directing the State of Florida and the Florida Department of State to implement the attached plan for the 2002 Florida House of Representatives elections as an interim remedy; and

C. Grant such other relief as the Court deems just and proper.

MEMORANDUM OF LAW

INTRODUCTION

The net effect of the DOJ's denial of preclearance to the House Plan under Section 5 of the Voting Rights Act, and the malapportionment of the 1992 plan for the House, is that Florida currently has no constitutionally-effective apportionment plan for its House of Representatives. This Court can no longer consider legal challenges to the House Plan brought by the plaintiffs in this case. Under the exigent circumstances created by the lack of a plan of apportionment and the imminence of elections, the appropriate remedy within this Court's authority is to order a plan of apportionment which minimizes deviation from the House Plan and addresses the concerns under Section 5 of the Voting Rights Act articulated by the DOJ. *See Upham v. Seamon*, 456 U.S. 37 (1982).[2]

[2] In *Upham*, the Supreme Court reversed the district court because it substituted its own plan for a legislative reapportionment plan that had been partially precleared by the Attorney General. The Court noted:

> Whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the

ANALYSIS

1. Florida currently has no constitutionally-effective plan of apportionment for its House of Representatives.

A. The House Plan is legally unenforceable.

Any statewide redistricting plan for Florida's state legislative districts requires preclearance from either the United States District Court for the District of Columbia or the United States Department of Justice. *See* 42 U.S.C. 1973c and 28 CFR § 51.4 and Appendix. On July 1, 2002, the DOJ issued a letter to Speaker Feeney and President McKay objecting to District 101 of the House Plan as not in compliance with Section 5 of the Voting Rights Act. *See* Exhibit A ("DOJ Objection Letter"). The DOJ noted, with respect to the reduced Hispanic population in District 101 in the House Plan (formerly Districts 101 and 102):

> [T]he state has not met its burden that this reduction will not result in a retrogression in Hispanic voters' effective exercise of their electoral franchise, or that any retrogression was unavoidable.

DOJ Objection Letter at 2.

As a result of the DOJ's denial of preclearance, Florida's House Plan is ineffective as a matter of law.[3] 42 U.S.C. 1973c. *See also Connor v. Waller*, 421 U.S. 656 (1975) (per curiam) (stating that plans of apportionment are not effective as laws until precleared). Although the

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> context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor intrude upon state policy any more than necessary.

Id. at 41-2. The Speaker respectfully suggests that the deference by a district court to a state legislative plan should be equal to or exceed the deference shown to a congressional reapportionment plan.

[3] The DOJ, in its letter, takes the position that, "the redistricting plan continues to be legally unenforceable." DOJ Objection Letter at 6. Notably, however, the DOJ stated that, other than its objection to District 101, "we find that the State has satisfied the burden of proof required by Section 5." *Id.* at 5.

House Plan and Senate Plan were adopted by joint resolution, the resolution contained a severability clause, so that the current ineffectiveness of the House Plan does not affect the Senate Plan. *See* Fla. HJR 1987, § 7, at 425, lines 18-25 (2002).

B. The operative reapportionment plan is malapportioned.

Because the House Plan has become legally unenforceable, the apportionment plan for the House in existence prior to the adoption of the House Plan would continue as the apportionment plan for the House. *See, e.g., Terrazas v. Clements*, 537 F. Supp. 514, 524 (N.D. Tex. 1982), *stay denied*, 456 U.S. 102 (1982). The 2000 Census indicates that the prior plan of apportionment for the Florida House is malapportioned in light of population changes in the State of Florida.

Thus, unless this Court orders the use of an interim plan of apportionment, the State of Florida will have no constitutionally-effective plan with which to conduct imminent elections.

2. The proper remedy is for this Court to order the use of a plan that addresses the objections of the Department of Justice and maintains the intent of the Florida Legislature in adoption of the House Plan.

A. The appropriate remedy within this Court's authority under the circumstances is to order a plan of apportionment.

It is by no means novel for a federal court to order a plan of apportionment where exigent circumstances so require. *See e.g. Burton v. Hobbie*, 543 F. Supp. 235, 238-39 (M.D. Ala.), *aff'd*, 459 U.S. 961 (1982) (ordering interim implementation of a modified legislatively adopted plan where elections were imminent and the Attorney General could not complete Voting Rights Act preclearance process).

In *Terrazas*, a three-judge court in Texas responded to exigent circumstances similar to the circumstances of this case by adopting an interim plan of apportionment. As in this case, the *Terrazas* court had recently concluded a trial on the merits of numerous claims against the state's

enacted legislative apportionment plans when the Department of Justice issued letters of objection to the plans.[4] *See Terrazas*, 537 F. Supp. at 519. The *Terrazas* court recognized the following circumstances as creating the exigency under which it was appropriate to adopt a plan so that elections could be held on a timely basis: (1) the Texas legislature was not in session, and its Legislative Redistricting Board was unable to meet under the state constitution, (2) the issuance by the DOJ of the letters of objection, and (3) the imminence of state primaries and state filing deadlines (three months before primaries and six days before filing deadline). *See id.* at 520-521. The *Terrazas* court noted that, "in those [emergency] situations courts are bound to apply equitable considerations and in awarding or withholding immediate relief, a court can and should consider the proximity of a forthcoming election and the mechanics and complexities of the State's election laws." *Id.* at 537. Ultimately, the court ordered interim implementation of a legislative apportionment plan that modified the plan adopted by the state redistricting board. *See id.* at 540. *See also Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 693 (D. Ariz. 1992) (ordering interim implementation of a plan of legislative apportionment where there was denial of Voting Rights Act preclearance and imminent elections); *Connor v. Waller*, 421 U.S. at 656 (recognizing that it may become appropriate for district court to require elections to be conducted by a court-ordered reapportionment plan).

Court-ordered plans are not subject to preclearance under Section 5 of the Voting Rights Act. *Connor v. Johnson*, 402 U.S. 690, 691 (1971) ("A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act."). While preclearance is generally required when a court adopts a plan of apportionment created by a legislative body, such

[4] The challenged plans had been adopted by Texas's Legislative Redistricting Board ("LRB"), as provided under Texas's state constitution. *Terrazas* at 517. The LRB drew the redistricting plans under its constitutional authority after the governor vetoed the Senate plan and the House plan was declared invalid by the Texas Supreme Court. *Id.* at 534. In large part, the LRB plan reflected the plans adopted by the Texas Legislature. *See id.* at 536.

preclearance is not required (1) where the court fashions a plan itself rather than adopting a litigant-proposed plan, or (2) when a court must implement an interim plan so that elections can be held. *McDaniel v. Sanchez*, 452 U.S. 130, 148-149 (1981) (court-fashioned plan); *Upham v. Seamon*, 456 U.S at 44 (interim plan).[5]

As a result of the DOJ's denial of preclearance of the House Plan, Florida now faces exigent circumstances that can be remedied only by an order of this Court adopting a plan of apportionment for the Florida House of Representatives. Florida's Legislature is no longer in session. Even if a special session were to be convened, adoption by the Legislature might, under the Florida Constitution, require review by the Florida Supreme Court, followed by a subsequent review by either the DOJ or the United States District Court for the District of Columbia, with preclearance continuing to remain uncertain. *See* Art. III, §16, Fl. Const. (1968, as amended) (constitutional requirements, including Florida Supreme Court review, for adoption and implementation of legislative plan), 42 U.S.C. 1973c, and 28 C.F.R. Part 51 and Appendix. Florida's Secretary of State previously estimated that June 14, 2002 was the date by which a final plan needed to be available to the 67 county supervisors of elections so that primary and general election deadlines could be met. *See* Defendant Katherine Harris's Response to Plaintiff's Motion to Remand, filed in Brown II [D.E. 13] at ¶ 3. We are now more than two weeks beyond June 14th, and Florida is left with ongoing voter and candidate confusion, as well as imminent disruption of its electoral process.

[5] The *Upham* Court also acknowledged that where "necessity has been the motivating factor," district courts have been authorized to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to legal and even constitutional requirements. *See Upham*, 456 U.S. at 44. The Supreme Court has, in fact, recognized that the "grant of equitable temporary relief by [a federal court] through the use of districts that are the subject of Section 5 objections is not per se contrary to the prohibitions of Section 5." *Terrazas*, at 539 (citing *Perkins v. Matthews*, 400 U.S. 379 (1971) (refusing to order new elections even though elections were conducted under plan that had not been precleared) and *Georgia v. United States*, 411 U.S. 526 (1973) (refusing to order new elections even though elections were conducted under plan that had not been precleared)).

Further, it is impracticable at this point to send the plan back to the Legislature with the intent of modifying any of the long-set dates for candidate qualifying or for primary elections. Numerous Florida residents have begun the process of informing voters about their impending candidacies based on their understanding of the enacted districts. Voters are aware of the current election dates. The various qualifying and election dates have been developed to allow for logistical preparation and for voters to become properly informed about their choices. In addition, any qualifying date or election date adjustments would implicate Florida's obligation per federal order to mail ballots to many overseas voters 35 days prior to a primary election, and would need to provide time to prepare and send such ballots (or, if House candidates are unknown at the time of mailing for Florida Senate and Congressional candidates, to provide a supplemental mailing, at great expense to Florida). *See United States of America v. State of Florida*, No. TCA 80-1055-WS (N.D. Fl. 1984) (Order of August 21, 1984) (adopting compliance plan pursuant to which such ballots must be sent); Fla. Stat. ch. 101.62(4)(a) (2001) (codifying the requirement). The inevitable result would be a compression of time between the primary and general election, creating further voter confusion and reducing the electorate's opportunity to familiarize themselves with candidates for office. Any solution adopted by this Court should seek to minimize voter and candidate confusion, not augment it.

In light of the exigent circumstances, it is this Court's obligation to order the implementation of an interim plan of apportionment. In *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978), the Supreme Court held:

> Legislative bodies should not leave their reapportionment tasks to the federal courts; but when . . . the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation," . . . of the federal court to devise and impose a reapportionment plan pending later legislative action.

Further, such a remedial interim plan can simultaneously address the DOJ's Section 5 concerns and provide an apportionment plan that the State of Florida can utilize in time to hold elections.

3. It is no longer appropriate to consider legal challenges to the House Plan; however, the Court retains jurisdiction to provide the requested relief.

In light of the DOJ's denial of preclearance of the House Plan, it is no longer appropriate for this Court to consider the Martinez Plaintiffs' legal claims challenging that plan. *See McDaniel*, 452 U.S. at 146 (1981) ("neither . . . until clearance has been obtained (for a new reapportionment plan enacted by a state) should a court address the constitutionality of the new measure"); *Connor v. Finch*, 431 U.S. 407, 412 (1977) (reiterating that district court errs in considering constitutional validity of legislative act which had not been precleared); *Terrazas*, 537 F. Supp. at 525 (noting that "it would appear that this Court is presently foreclosed from ruling whether the claims of constitutional error in the [state legislative] plans have any validity").[6]

The failure of the DOJ to preclear the House Plan does not rob this Court of jurisdiction to grant the relief that the Speaker requests herein. The *Terazzas* court specifically noted that the initial jurisdiction it had prior to the DOJ's denial of preclearance provided it the continuing necessary subject matter jurisdiction to implement the requisite remedy under the circumstances. *See Terrazas*, 537 F. Supp. at 546, n. 14 (citing *Connor v. Waller* and *Wise v. Lipscomb*, and noting "...as *Waller* and *Wise* indicate, our jurisdiction did not dissolve because of the requirements of Department of Justice preclearance; while we have no authority to adjudicate the substantive constitutional and voting rights claims . . . our initial Article III jurisdiction and the current exigencies . . . are the bases for our authority to act.").[7] Thus, while the Court should no

[6] The *Terrazas* court further noted: "the LRB plans, not effective as law, are simply not before this Court for adjudication of questions of constitutionality." 537 F. Supp. at 525.

[7] In *Connor v. Waller*, the Court held that a three-judge court erred in, *inter alia*, deciding constitutional challenges

longer adjudicate the claims previously brought by the *Martinez* Plaintiffs against the House Plan, it retains jurisdiction to provide the relief necessary to prevent a disruption of Florida's government.

4. Any plan adopted should minimize deviation from the House Plan, while addressing the DOJ's concerns under Section 5 of the Voting Rights Act.

A. Minimization of deviation from the House Plan.

The Court should adopt a court-ordered plan that minimizes deviation from the plan adopted by the Florida Legislature. In *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971) the Supreme Court recognized that in ordering redistricting plans, a federal court should not "intrude upon state policy any more than necessary..." and held that the District Court erred in "brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so." *See, e.g., Terrazas*, 537 F. Supp. at 528 ("In choosing among plans for implementation, a court should select the plan most nearly adhering to the district configurations in the State's enactment to the extent that such adherence does not detract from constitutional requirements.") (citing *White v. Weiser*, 412 U.S. 783, 796 (1973)).[8] In light of the guidelines provided by the United States Supreme Court in *Weiser* and *Chavis*, the *Terrazas* court adopted a plan that had as its core the state enacted plan, with only those modifications necessary to address concerns under

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to acts not yet given Section 5 preclearance, but that "this reversal is, however, without prejudice to the authority of the District Court, if it should become appropriate, to entertain a proceeding to require the conduct of the 1975 elections pursuant to a court-ordered reapportionment plan that complies with this Court's decisions . . . ." *Waller*, 421 U.S. at 656.

[8] In *White v. Weiser*, the Supreme Court stated:

> [A] federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution(.) ...

412 U.S. at 795.

Section 5 of the Voting Rights Act as articulated by the DOJ. In *Upham*, the United States Supreme Court summarized this policy:

> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of "reconciling the requirements of the Constitution with the goals of state political policy." . . . An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect.

456 U.S. at 43 (citiations omitted).

B. Addressing concerns under Section 5 of the Voting Rights Act.

This Court does not have the power to adjudicate whether the House Plan complies with Section 5 of the Voting Rights Act. That power is reserved to the United States District Court for the District of Columbia. 42 U.S.C. 1973c; *Lopez v. Monterey County, California*, 519 U.S. 9, 23 (1996) (citing *Perkins v. Matthews*, 400 U.S. 379, 385 (1971)). Nevertheless, in fashioning a court-ordered plan under exigent circumstances, the court should follow the appropriate Section 5 standards. *See McDaniel v. Sanchez*, 452 U.S. at 148. *See also Terrazas*, 537 F. Supp. at 537-546 (adopting plan that attempted to remediate DOJ objections where it was possible to do so). Thus, in accordance with Supreme Court precedent, this Court should adopt a plan that (1) adheres as much as possible to the House Plan, and (2) addresses the minimal objection under Section 5 of the Voting Rights Act articulated by the DOJ.

The plan submitted herewith is an appropriate interim plan for the Court to implement. It adheres to the policy choices made by the Legislature, only deviating from those to cure the Section 5 issues identified by the DOJ. Simultaneously with the filing of this Motion for Emergency Relief, the Speaker has provided the DOJ with a copy of the proposed interim plan so that they can immediately begin an evaluation. The Speaker respectfully suggests that

inviting the DOJ to participate in the emergency hearing requested hereunder would aid the Court in analyzing the plan.

CONCLUSION

WHEREFORE, for the foregoing reasons, Speaker Feeney respectfully moves this Court to enter an order adopting an interim plan of apportionment for the Florida House of Representatives that adheres to the core of the House Plan, while remedying objections under Section 5 of the Voting Rights Act articulated by the Department of Justice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via facsimile this 2nd day of July, 2002 to the following:

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